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83-895

No.

In The

Supreme Court of the United States

October Term, 1983

VAUGHN PEARSON,

Petitioner,

vs.

COLUMBIA BRIARGATE COMPANY,

Respondent.

Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

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QUESTION PRESENTED

1. Whether a district court may exercise jurisdiction over the person of a nonresident individual, whose only contact with the forum state was his attendance, solely in his capacity as an officer of a foreign corporation, at a brief closing of a real estate transaction on behalf of the corporation.

PARTIES BELOW

The caption of the case in this Court contains the names of all interested parties to the proceedings before the United States Court of Appeals for the Fourth Circuit. The caption of the case in the Court of Appeals included First National Bank in Dallas and A. S. Kyzer, Jr. as appellees, along with Vaughn Pearson, although neither of those persons was affected by the outcome of the proceedings. First National Bank in Dallas was dismissed as a defendant by the District Court — a ruling which was not challenged on appeal — and A. S. Kyzer, Jr., a resident of South Carolina, did not challenge the Court's jurisdiction over his person. Consequently, neither First National Bank in Dallas nor A. S. Kyzer, Jr. has an interest in these proceedings.

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For The Fourth Circuit

Petitioner Vaughn Pearson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on August 10, 1983.

OPINION BELOW

The opinion of the Court of Appeals is reported at 713 F.2d 1052 and appears in Appendix A hereto.

The opinion of the United States District Court for the District of South Carolina, which is not reported, appears in Appendix B hereto.

The judgment of the Court of Appeals appears in Appendix C hereto.

JURISDICTION

The opinion of the Court of Appeals was entered on August 10, 1983. No petition for rehearing was filed. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the fourteenth amendment, U.S. CONST. amend. XIV, §1, which provides, in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In June 1979, respondent Columbia Briargate Company ("Briargate"), a California limited partnership, purchased an apartment complex (the "Apartments") in Columbia, South Carolina from First National Bank in Dallas (the "Bank"). Pursuant to the contract of sale, the Bank undertook to effect certain repairs to the Apartments prior to closing, and agreed to furnish Briargate at closing with an engineer's certificate warranting that the

repairs had been completed and no future problems were anticipated. Petitioner Vaughn Pearson ("Pearson"), an officer of the Bank, attended the closing in South Carolina on behalf of the Bank, and furnished Briargate with the required certificate, which was signed by A.S. Kyzer, Jr. ("Kyzer"), an independent consulting engineer.

Briargate subsequently brought this action against the Bank, Pearson and Kyzer seeking damages for alleged (1) breaches of warranties contained in the contract of sale and (2) fraudulent misrepresentations contained in the engineer's certificate. Jurisdiction in the District Court was predicated on diversity of citizenship. 28 U.S.C. §1332 (1970).

In response to Briargate's complaint, Pearson filed a motion to dismiss, pursuant to Rule 12(b) (2) of the Federal Rules of Civil Procedure, claiming that the District Court lacked jurisdiction over his person. In this connection, the record demonstrates that Pearson was not a party to the contract of sale (App. 8)[1] and that he simply attended a brief closing of the sales transaction in South Carolina "representing First National Bank in Dallas" (App. 46).

The sole affidavit submitted by Briargate in support of personal jurisdiction established only this *one* contact

[1] The District Court did not conduct an evidentiary hearing on the jurisdictional issue. Instead, the issue was submitted on the basis of the pleadings and affidavits. Accordingly, the Appendix filed by Briargate with the United States Court of Appeals for the Fourth Circuit constituted the entire record on appeal below, and all references to that Appendix will be indicated by "App.", followed by the page number to which reference is made.

Unless otherwise indicated, all emphases are supplied by counsel.

by Pearson with the State of South Carolina; the record is devoid of any evidence establishing other contacts by Pearson with the State of South Carolina (App. 46-47). Indeed, there is no proof in the record of how the contract of sale was negotiated, where it was negotiated, the location of the parties negotiating it, or any communications concerning it connected with the forum (App. 46-47).

Rather, the record demonstrates that Pearson, who was served with process herein under the South Carolina "long-arm" statute, S.C. Code §36-2-803 (1976), is an officer of the Bank who has resided in Dallas, Texas for the past eleven years (App. 29). In September 1979, Pearson attended a two day closing of the sale of the Apartments in Columbia, South Carolina (App. 46). At that time, he merely delivered to Briargate a letter from Kyzer containing the alleged misrepresentations (App. 46). Moreover, all of Pearson's contacts with the State of South Carolina — as very limited as they are — were undertaken by him in a representative capacity on behalf of the Bank (App. 30). Further, it is uncontroverted that Pearson's minimal contacts with the State of South Carolina were for the sole benefit of the Bank and not for his personal benefit (App. 30).

On the basis of these facts the District Court dismissed Pearson as a defendant, determining that Briargate had not sustained its burden of demonstrating Pearson's amenability to service under the requirements of either the South Carolina statute governing nonresident service or the due process clause of the fourteenth amendment (App. 58; Appendix B, at 12). Citing numerous decisions

of the United States Courts of Appeals, federal district courts and state courts, in support of the "well-recognized fiduciary shield doctrine," the District Court concluded that the exercise of jurisdiction over Pearson did not comport with principles of fair play and substantial justice since his limited contacts with South Carolina related to corporate business conducted for the sole benefit of the Bank and not for his personal benefit (App. 53-57; Appendix B, at 8-11).

The order of dismissal entered by the District Court was reversed by the Court of Appeals. In doing so, the Court of Appeals rejected earlier decisions by other Courts of Appeals which had articulated the "fiduciary shield" doctrine in expansive terms and as a constitutional principle.

REASONS FOR GRANTING THE WRIT

I.

The decision below conflicts with decisions of other Courts of Appeals and state courts of last resort. Significantly, every Court of Appeals which has considered the question to date has held that the acts of a nonresident individual within the forum, which were committed solely in a representative capacity, were insufficient contacts to support the exercise of jurisdiction over such individual personally. *E.g., Marine Midland Bank, N.A. v. Miller,* 664 F.2d 899, 902 (2d Cir. 1981); *Lehigh Valley Industries, Inc. v. Birenbaum,* 527 F.2d 87, 92-93 (2d Cir. 1975); *Weller v. Cromwell Oil Co.,* 504 F.2d 927 (6th Cir. 1974); *Wilshire Oil Co. of Texas v. Riffe,* 409 F.2d 1277, 1281 (10th Cir.

1969). Indeed, the principle is now so well-established through numerous court decisions that it has been coined the "fiduciary shield" doctrine.

Although some of the cases discussing the doctrine have opined that the principle is not of constitutional dimension, a host of others, including *Lehigh Valley, Weller,* and *Wilshire,* as well as numerous district court decisions,[2] have indicated that the "fiduciary shield" doctrine is a constitutional principle based on due process under the fourteenth amendment — a fact acknowledged by the Court of Appeals in its opinion here. *See* Appendix A, at 16. Moreover, even the court in *Marine Midland,* which noted at the outset that the specificity of New York's long-arm statute eliminated the need for constitutional analysis, emphasized that the well-recognized fiduciary shield doctrine was premised on traditional notions of fairness. 664 F.2d at 902.

The rationale underlying these decisions is obvious, and can be traced to decisions emanating from this Court. In the landmark decision on personal jurisdiction, *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945), this Court held that the defendant's contacts with the forum, forming the basis for the exercise of jurisdiction over his person, must be such that the maintenance of the suit "does not offend 'traditional notions of fair play and substantial justice'." Further, the defendant must have "purposely availed itself of the privilege of

[2] *See, e.g.,* State Sec. Ins. Co. v. Frank B. Hall & Co., 580 F.Supp. 94, 96 (N.D. Ill. 1981); Bulova Watch Co. v. K. Hattori & Co., 508 F.Supp. 1322, 1348 (E.D.N.Y. 1981); Stop-A-Flat Corp. v. Electra Start of Michigan, 507 F.Supp. 647, 651 (E.D. Pa. 1981) (applicable long-arm statute reached to outer limits of due process).

conducting activities within the forum state." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Finally, the defendant's relation with the forum state must be such that he should reasonably anticipate being haled into court there. *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977). In short, the exercise of jurisdiction over the defendant is proper only if the defendant has *clear* notice that he is subject to suit in the forum, and it is reasonable to require him to defend the suit there. *World-Wide Volkswagen Corp. v. Woodsen*, 444 U.S. 286, 292, 297 (1980). In following these dictates, other Courts of Appeal, as well as the District Court here, have simply recognized that it is unfair to force an individual to defend a suit brought against him personally in a forum with which his only relevant contacts are acts performed not for his own benefit but for the benefit of his employer. *See, e.g., Marine Midland Bank, N.A. v. Miller*, 664 F.2d at 902; *Weller v. Cromwell Oil Co.*, 504 F.2d at 931; Appendix B, at 10-11.

In this case, Briargate failed to establish that Pearson purposely availed *himself* of the privilege of conducting business in South Carolina. More importantly, it is doubtful that Pearson could reasonably have anticipated being haled into court in South Carolina by virtue of (1) his brief attendance at the closing on behalf of the Bank and (2) his delivery of a certificate prepared by someone else. The fiduciary shield doctrine, as articulated by the courts, reflects a policy that it is unfair to subject an individual such as Pearson to jurisdiction under these circumstances.

Nevertheless, wholly ignoring due process principles

the Court of Appeals simply rejected the fiduciary shield doctrine espoused by the other Courts of Appeals, adopting in its place a jurisdictional standard which basically relies on "presence" of the corporate agent in the forum state. *See* Appendix A, at 20-23. In this connection, the Court of Appeals sought in its opinion to distinguish every decision supporting the fiduciary shield doctrine as involving a situation where the agent was never *physically* present in the forum state, even though his acts outside the forum might have had foreseeable consequences within that state.

The problem with this approach is that "presence" is no longer the touchstone of the jurisdictional inquiry. Even the Court of Appeals conceded that a corporation may be amenable to jurisdiction in a distant forum beyond the state in which it is physically present by virtue of engaging in activities having foreseeable ramifications in the forum state. *See* Appendix A, at 21. Certainly the same rule must apply to individuals as well. The standard adopted by the Court of Appeals, however, effectively disembowels this principle. If Pearson had intentionally forged the engineer's certificate and then mailed it from his Dallas office to Briargate in California, the Court of Appeals would conclude that he was not amenable to jurisdiction in South Carolina. By the same token, according to the Court of Appeals, Pearson's mere presence in South Carolina, during which time he tendered a certificate to Briargate containing the *engineer's* warranties, constitutes sufficient contacts with the state

to support the exercise of jurisdiction over him personally.

The fiduciary shield doctrine, on the other hand, fully ignores the location of the alleged transgression, and simply inquires whether the facts in each case are such that (1) the corporate agent should reasonably anticipate being haled into the forum state to answer for his actions there and (2) the exercise of jurisdiction over the corporate agent accords with traditional notions of fair play and substantial justice. By eliminating these elements from the jurisdictional inquiry, the Court of Appeals has ignored the guidelines enunciated by this Court and established a conflict with the decisions of the other Courts of Appeals listed above.

II.

In addition, the decision below raises a genuine and substantial question of constitutional law that has not yet been, but should be, considered by this Court. As pointed out above, the Court of Appeal's decision represents the first departure from a long and nearly unanimous line of authority upholding the validity of the fiduciary shield doctrine as a jurisdictional principle. Even the Court of Appeals conceded that many decisions, including those of other Courts of Appeals, which were based on decisions of this Court, have attributed constitutional stature to the doctrine.

Significantly, the Court of Appeals readily acknowledged its inability to distinguish many of the conflicting decisions which fully support the fiduciary shield doctrine. In attempting to do so, however, the Court of

Appeals eventually admitted that its decision was strongly influenced by the dichotomy between principles of substantive liability and jurisdiction that inheres in the fiduciary shield doctrine. According to the Court of Appeals, this dichotomy would allow Pearson to escape jurisdiction, and leave Briargate with no other responsive party to sue since the Bank is also immune from jurisdiction. *See* Appendix A, at 31-33.

Certainly this "dichotomy" noted by the Court of Appeals is an inappropriate basis for deciding a jurisdictional issue of constitutional dimensions. Indeed, all cases concerning *in personam* jurisdiction involve such a dichotomy because any party dismissed for lack of personal jurisdiction could potentially be liable on the merits — the suit must simply be lodged in another forum. In the final analysis then, the decision here is predicated in large part, if not entirely, on what the Court of Appeals termed the "bizarre" circumstance that Briargate cannot maintain its suit against the Bank in South Carolina due to the provisions of Section 94 of the National Bank Act. *See* Appendix A, at 32. Surely any unfairness to Briargate caused by that section, however, should not have altered a constitutional inquiry which, according to decisions of this Court, is to be focused on fairness to Pearson.

Nevertheless, in an effort to rectify what it perceives as an inequity in this single instance, the Court of Appeals renounces entirely a doctrine that has been recognized universally elsewhere. The impact of the conflict among the Courts of Appeals thus created is not narrowly confined and is apt to have continuing future consequences,

as the standard announced by the Court of Appeals here, which cannot possibly be applied consistently, is substituted for the prevailing uniformity of the fiduciary shield doctrine.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit have been furnished by mail to Mr. T. Alexander Beard, Cooper, Bowen, Beard & Smoot, 1111 Broad Street, P. O. Drawer 99, Camden, South Carolina 29020 on November __, 1983. I further certify that all parties required to be served have been served.

.....

Ernest E. Figari, Jr.
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 82-2054

Columbia Briargate Company,
a limited Partnership,

Appellant,

-versus-

First National Bank In Dallas;
Vaughn Pearson and A. S. Kyzer, Jr.,

Appellees.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Matthew J. Perry, District Judge.

Argued: April 13, 1983. Decided: August 10, 1983

Before WINTER, Chief Judge, RUSSELL, Circuit Judge, and JAMES C. FOX, United States District Judge for the Eastern District of North Carolina, sitting by designation.

Cynthia Hall Ouzts (T. Alexander Beard, Cooper, Bowen, Beard & Smoot on brief) for Appellant; A. Erin Dwyer (Ernest E. Figari, Jr., Johnson & Swanson; William L. Pope, Robert C. Kelly, Robinson, McFadden, Moore, Pope, Williams, Taylor & Brailsford, P.A. on brief) for Appellee.

RUSSELL, CIRCUIT JUDGE:

This is an action to recover for alleged fraudulent

representations in the negotiations of a contract of sale of a group of fourteen (14) apartment buildings containing three hundred, thirty-six (336) apartment units, known as the Briargate Apartments in Columbia, South Carolina. As filed in the district court of South Carolina it asserted federal diversity jurisdiction. The plaintiff purchaser is a limited partnership organized and existing under the laws of the State of California with its principal place of business in that State. The defendants are the First National Bank In Dallas, a national banking association with its principal place of business in the State of Texas, its vice-president, individually, a resident of Texas (Pearson), and an engineer employed by the Bank, a resident of South Carolina (Kyzer), who had given, allegedly at the instance of Pearson, a certificate to the plaintiff on behalf of the bank "that the apartments were in proper repair, that all deferred maintenance had been performed, and that corrective repairs had been accomplished with respect to the water seepage problem and no further problems were anticipated."

The defendant Bank and its vice-president Pearson, both of whom had been served under the South Carolina long arm statute,[1] joined in a motion to dismiss the action against them on jurisdictional grounds. There is no issue made of the amenability to suit of the defendant engineer in the district court and the sole ground of appeal raised concerns the amenability of the Bank and its vice-

[1] S.C. Code §36-2-803 (1976). Rule 4(e), Fed.R.Civ.P. authorizes a federal district court seeking to reach a party not found within the territory of the state within which the court is held and not amenable to suit under either federal statutes authorizing extra-territorial service or the bulge process provision of Rule 4(f) to borrow the long-arm authority of the state within which the federal court sits.

president, the defendant Pearson, to jurisdiction herein. In their initial motion, the joint contention of the Bank and its vice-president Pearson, was, so far as the Bank itself was concerned, that "the sole venue of this action against the Bank is the Dallas Division and, as a result, the United States District Court for the District of South Carolina, Columbia Division, is an improper venue" for this action. It rests this contention on §94, 12 U.S.C. [2] As to the individual defendant Pearson, their claim was that he had "acted solely in a representative capacity on behalf of the Bank in all his contracts with the State of South Carolina," and that, under those circumstances, "the assertion of jurisdiction over [his] person . . . would be contrary to the Fourteenth Amendment." The motion, also, raised the contention that Pearson had a "derivative" immunity under §94, 12 U.S.C. as a national bank officer acting in his agency capacity against suit in any venue other than the Division of Dallas. Certain affidavits pro and con were filed with the district court in connection with this motion.

After a hearing, the district court granted the motion to dismiss on behalf both of the Bank and of Pearson. It sustained the Bank's claim under §94, 12 U.S.C. and that of Pearson under what it declared is the controlling "fidu-

[2] 12 U.S.C. § 94 provides:

"Any action or proceeding against a national banking association for which the Federal Deposit Insurance Corporation had been appointed receiver, or against the Federal Deposit Insurance Corporation as receiver of such association, shall be brought in the district or territorial court of the United States held within the district in which that association's principal place of business is located, or, in the event any State, county, or municipal court has jurisdiction over such an action or proceeding, in such court in the county or city in which that association's principal place of business is located."

ciary shield" doctrine. The plaintiff has appealed the dismissal of the action against Pearson but does not contest the dismissal of the Bank as a defendant.

We reverse.

I

The plaintiff's complaint alleged that, in the course of negotiating the sale of the Briargate Apartments by the Bank to the plaintiff, the defendant Pearson either made, or induced others to make, a number of false and fraudulent representations about the conditions of the apartments, representations on which the plaintiff had a right to rely in contracting to buy the apartments, and that, as a result of such misrepresentations, it (the plaintiff) sustained substantial damages. For purposes of the motion, these allegations must be assumed to be true. Also for purposes of the motion, it appears to have been agreed at the hearing (1) that the subject-matter or res of the contract negotiation was real estate located in Columbia, South Carolina, owned at the time by the Bank, (2) that all the negotiations for the purchase and sale of such real property between the purchaser and seller were carried out and the contract resulting from such negotiations was executed by both parties thereto in Columbia, South Carolina, (3) that the individual defendant Pearson was at all times the agent of the Bank in negotiating such sale and in furnishing the various certificates and representations required under the terms of the sale and that he executed on the Bank's behalf the deed to the purchaser, and (4) that all such activities of the defendant Pearson occurred in Columbia, South Carolina, over a period of several days.

II

The principle appears settled that a federal action for fraud or misrepresentation in the diversity jurisdiction is governed by the substantive law of the state where the fraudulent action took place. §148, Second Conflict of Laws (1971). In this case, the controlling law would accordingly be that of South Carolina. *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 606 (3d Cir. 1978). Under the law of that jurisdiction, "[a]n agent's liability for his own tortious acts [in such an action is plain and] is unaffected by the fact that he acted in his representative capacity." *Lawlor v. Schieper*, 232 S.C. 94, 98-99, 101 S.E. 2d 269, 271 (1957). That principle was recently applied in another South Carolina case similar factually to this case. A corporation and its president were sued for fraudulent representations allegedly made by the president in negotiating a sale of a business to the plaintiffs. The officer-defendant "moved for a directed verdict on the ground there was no evidence he acted in his individual capacity." The motion was denied and the Supreme Court of South Carolina affirmed, quoting the language of *Lawlor, supra. Gilbert v. Mid-South Machinery Co., Inc.*, 267 S.C. 211, 221, 227 S.E. 2d 189, 193 (1976).

This South Carolina rule on the liability of the agent for torts committed in his fiduciary capacity either in a suit against him individually or in a joint suit against him and his principal, is similar to that in other jurisdictions, provided the alleged tort was committed or participated in by the agent. *See Tillman v. Wheaton-Haven Recreation Ass'n., Inc.*, 517 F.2d 1141, 1144 (4th Cir. 1975); *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902,

907 (1st Cir. 1980); *Donsco, Inc. v. Casper Corp., supra*, 587 F.2d at 606; *A & M Records, Inc. v. M.V. C. Dist. Corp.*, 574 F.2d 312, 315 (6th Cir. 1978); *Zubric v. Zubric*, 384 F.2d 267, 275-6 (3d Cir.), *cert denied*, 390 U.S. 988 (1968); 3A Fletcher, Cyclopedia of the Law of Private Corporations § 1135, at 202, 203 (1975); and Restatement (Second) of Agency §343 (1957). Of course, "[i]f [an officer] does not personally participate in the corporation's tort, general corporation law does not subject him to liability simply by virtue of his office." *Tillman v. Wheaton-Haven Recreation Ass'n., Inc., supra*, 517 F.2d at 1144; *Monsen v. Consol. Dressed Beef Co., Inc.*, 579 F.2d 793, 804 (3d Cir. 1978), *cert. denied*, 439 U.S. 930.

We do not understand the defendants to question this South Carolina rule with respect to the substantive liability of an agent or officer for tortious conduct committed by him whether he was acting solely for the benefit of his employer or for his personal benefit. It is, however, their argument that the substantive liability of a non-resident agent-defendant such as the defendant Pearson and his amenability to jurisdiction claimed under a service pursuant to a state long-arm statute, are questions subject to entirely different, even contradictory, rules, and that Pearson, who was at all times acting in his capacity as an officer of the Bank in the matters involved in this suit and a non-resident of South Carolina, is entitled to immunity under what is known as the "fiduciary shield" doctrine from valid service of process under the South Carolina long-arm statute for an alleged tort committed by him in South Carolina, even though concededly he is substantively liable for his participation in the tort. Such doctrine

constitutes the defendant's asserted ground for quashing the service herein on him and for dismissing the action against him. The validity of this claim is the single issue in this appeal.

III

This doctrine of "fiduciary shield," as invoked by Pearson, emerged "with little notice and with no critical examination"[3] as a novel principle by way of dicta in a series of decisions of the New York state and federal courts in the mid-sixties just as a more liberal and relaxed rule was developing in federal courts in favor of the application of state long-arm statutes themselves.[4] Its source is generally identified as a dictum in *Boas & Associates v. Vernier*, 22 A.D.2d 561, 563, 257 N.Y.S. 2d 487, 490 (1st Dep't. 1965). The first identification of the doctrine in the New York federal courts was in *United States v. Montreal Trust Company*, 358 F.2d 239 (2d Cir. 1966), *cert. denied*, 384 U.S. 919. "[U]nder the 'fiduciary shield' doctrine,"[5] as it has generally been phrased, "the acts of a corporate officer or employee taken in his corporate capacity within the jurisdiction generally do not form the predicate for jurisdiction over him in his individual capacity." *Bulova Watch Co. v. K. Hattori & Co., Ltd.*, 508 F. Supp. 1322, 1347 (E.D.N.Y. 1981). The court in *Montreal Trust*, though was careful to point out that in being asked to

[3] See Sponsler, Jurisdiction Over the Corporate Agent: The Fiduciary Shield, 35 Wash. & Lee L. Rev. 349, 350 (1978). The development of the doctrine is thoroughly canvassed in this article.

[4] The reason for this relaxation was stated in McGee v. International Life Ins. Co., 355 U.S. 220, 222-23 (1957), and reiterated in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292-93 (1980).

[5] It is said that Montreal Trust first coined the term "fiduciary shield." 358 F.2d at 243.

accept and apply the doctrine, it was not being "presented with a constitutional issue but with a narrow question of statutory interpretation," *i.e.*, of the New York long-arm statute. It emphasized, in discussing the state statute, that New York had not " sought to obtain [under its long-arm statute] full *in personam* jurisdiction over non-domiciliaries who transact business within its boundaries."[6] In neither *Boas* nor *Montreal Trust* did the court elaborate on the doctrine or attempt to offer any logical rationale for it other than as a simple construction of the restricted New York long-arm statute.[7] It was under these circumstances and thus as an incident of the construction of the New York long-arm statute itself (which was not intended to go to the outer limits of due process) and not as an enunciation of any carefully analyzed and reasoned constitutional principle that the court both in *Boas* and *Montreal Trust* made its statements with respect to the "fiduciary shield" doctrine.

That concept as expressed in both *Boas* and *Montreal Trust* that the "fiduciary shield" doctrine is simply an incident of statutory construction and not a constitutional principle has been restated and, to some extent,

[6] 358 F.2d at 242. See also Guccione v. Guccione, 417 N.Y.S. 2d 633, 636 (1979).

[7] The rule of the Second Circuit is that "the amenability of a foreign corporation [or other non-resident] to suit in a federal court in a diversity action is determined in accordance with the law of the state where the court sits, with 'federal law' entering the picture only for the purpose of deciding whether a state's assertion of jurisdiction contravenes a constitutional guarantee." Arrowsmith v. United Press International, 320 F.2d 219, 223 (2d Cir. 1963). The rule in this circuit is the same: Haynes v. James H. Carr, Inc., 427 F.2d 700, 703 (4th Cir. 1970), cert. denied, 400 U.S. 942. Under this rule, a court only reaches the constitutional issue of the enforcement of state long-arm statute if it has already found enforcement authorized under the state statute.

enlarged upon in the latest exposition of the doctrine by the Second Circuit in *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899 (2d Cir. 1981).[8] In this case the court declared: "The fiduciary shield doctrine is not a constitutional principle, but is rather a doctrine based on judicial inference as to the intended scope of the long arm statute." The court went further and characterized the doctrine not precisely as a matter of statutory construction but rather as an "equitable doctrine" under the statute which was not to be applied inflexibly or "mechanically"[9] but rather to be applied by the court with "a sound exercise of discretion" in order to achieve the ultimate purpose of "fairness" arising out of an "analysis of the particular facts of the case."[10] It proceeded in this vein to declare, that if there was a basis for treating the corporate principal as an "empty shell," the "fiduciary shield" could be disregarded much the same as in other contexts the corporate veil is disregarded or, to use the technical jargon, "pierced," though under more liberal rules than those which governed the "piercing" of the corporate veil in the usual case. *See Holfield v. Power Chemical Company, Inc.*, 382 F. Supp. 388, 394 (D.Md. 1974)[11] and *Puerto Rico*

[8] See, also, Laufer v. Ostrow, 55 N.Y. 2d 305, 434 N.E.2d 692 (1982).

[9] This concept of the doctrine as an "equitable" principle had earlier been suggested by Judge Weinstein in Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd., supra, 508 F.Supp. at 1348:

"As the term 'fiduciary shield' suggests, this is an equitable doctrine. It should be followed not with mechanically but with a sound exercise of discretion."

[10] 664 F.2d at 902, n. 3 and at 903.

[11] A recent decision in State Ex Rel. Miller v. Internal. Energy, Etc., 324 N.W. 2d 707 (Iowa 1982), after reviewing Marine Midland and particularly its comments on a liberalized basis for disregarding the corporate defendant, had held that "allegations of fraud are sufficient in themselves under the less stringent test [established by

Maritime Shipping Auth. v. Almogy, 510 F. Supp. 873, 876 (S.D.N.Y. 1981).

If the proper scope of the doctrine is one purely of statutory construction — if it is simply a rule of statutory construction where the statute concededly does not seek to go to the utmost limits of due process — it is without application in this case where service was had under the South Carolina long-arm statute, which, unlike the New York long-arm statute, extends the amenability of a nonresident to jurisdiction "to the outer perimeter allowed by due process." *O'Neal v. Hicks Brokerage Co.*, 537 F.2d 1266, 1268 (4th Cir. 1976); *Triplett v. R. M. Wade & Co.*, 261 S.C. 419, 427-28, 200 S.E.2d 375, 378-79 (1973).[12] It is, therefore, unnecessary in this case to go through the normal two-step formula of examining first the validity of the service under the statute of the forum state (the only step taken in *Boas, Montreal Trust* and *Marine Mid-*

fn. 11 (continued)
Marine Midland] to disregard [the corporate defendant's] corporate existence and attribute its minimum contacts with [the forum state] to [the agent] on an individual basis. Id. at 714. It accordingly found the doctrine inapplicable in the case under review because the suit charged fraudulent representations.

[12] A recent case of this Circuit illustrative of the application of this principle in the context where the state court has given the state long arm statute a different construction than that earlier adopted in federal courts in the state is Cawley v. Block, 544 F.Supp. 133 (D.Md. 1982), where the court abandoned its position in the earlier case of In Re Mid-Atlantic Toyota Antitrust Litigation, 525 F.Supp. 1265 (D.Md. 1981) and relies primarily on what the court found to be the adoption of the "fiduciary shield" doctrine as a proper construction of the Maryland long-arm statute. It accordingly proceeded to adopt what it perceived to be the Maryland court's construction of its long-arm statute. *Umans v. P.W.P. Services, Inc.*, 50 Md. App. 414, 439 A.2d 21 (1982). Such a decision, based on the State's own construction of its long-arm statute, is different from a case such as that here where the issue is not one of state law but of federal constitutional law.

land). Our inquiry is limited to whether an exercise of jurisdiction over Pearson under the circumstances of this case is consistent with due process since the test of amenability under the state law and under the constitutional test are obviously identical here.[13] It is accordingly proper in this case to proceed directly to the dispositive issue of whether the doctrine can be said to represent a due process qualification or limitation upon the effective use of the state's long-arm statute in this case.

IV

In seeking to answer the dispositive question in this case, we must identify at the outset the due process requirements established by the Supreme Court for acquiring jurisdiction in a forum state over a non-resident under a state long-arm statute. The Supreme Court has, in a line of cases beginning with *Internat. Shoe v. Washington*, 326 U.S. 310 (1945) formulated these due process standards which must be met in order to acquire such jurisdiction. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. California Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Hanson v. Denckla*, 357 U.S. 235 (1958); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). The test established under such standards requires sufficient "minimum contacts" of the non-resident with the forum state as "'not [to] offend "traditional notions" of fair play and substantial justice,'" *Woodson, supra*, 444 U.S. at 291-92, by providing a "sufficient connection between the [non-

[13] See, Note, Return to the Twilight Zone — Federal Long-Arm Jurisdiction and Amenability to Federal Rule of Civil Procedure 4(f) Bulge Service of Process: Sprow v. Hartford Insurance Co., 41 Ohio St.L.J. 685, 701, n. 127 (1980).

resident] defendant and the forum State to make it fair to require defense of the action in the forum," *Kulko, supra,* 436 U.S. at 91. This burden has been held to be satisfied when there has been "some act [related to the cause of action alleged] by which the [non-resident] defendant purposefully avails [himself] of the privilege of conducting activities within the forum State . . . ." *Hanson v. Denckla, supra,* 357 U.S. at 253. As 2 Moore's *Federal Practice,* §4.41-1[3], pp. 4-477-79 (1983) has put it, "[m]ost courts have held that the commission of a single tortious act is a sufficient contact upon which to base the assertion of in personam jurisdiction." And this is particularly so where the "tortious act" arises out of a "contact which had substantial connection with the State" such as a contract for the sale of real estate in the forum state. *McGee v. International Ins. Co., supra,* 355 U.S. at 223. In such a case the agent has availed himself of "the privilege of conducting activities within the forum State" and by that act he "has clear notice that [he] is subject to suit there . . . ." *Woodson, supra,* 444 U.S. at 297. There is no distinction made in these cases of the role in which the defendant performed his tortious acts, whether for his personal benefit or for the benefit of an employer or third party; the controlling issue is simply whether the non-resident defendant, whatever role he may have occupied, had such "minimum contacts."

The existence of "minimal contacts" of the defendant Pearson with the forum State in this case is plain. He came to the forum State in order to negotiate a sale of real property located in the State. He conducted such negotiations over a period of time and in the course of those

negotiations in the forum State allegedly made various representations which it is claimed by the plaintiff were fraudulent, and, on the basis of such fraudulent representations, induced the plaintiff to purchase such property of the Bank in a transaction consummated in the forum state. In so doing Pearson availed himself "of the privilege of conducting activities within the forum State" and rendered himself amenable to service of process under the long-arm statute of the forum state.

Thus, if we look to the Supreme Court decisions, it would seem indisputable that jurisdiction over Pearson in this case was validly acquired by service of process in Texas under the terms of the South Carolina long-arm statute unless it can be said that such jurisdiction is qualified on due process grounds by the "fiduciary shield" doctrine. There is, as we have already indicated, no language in any of the Supreme Court decisions dealing with the long-arm statutes that suggests the existence of any such qualification. We must accordingly look elsewhere than in the decisions of the Supreme Court for a constitutional basis for attaching this doctrine as a limitation upon the use of a long-arm statute. In making such inquiry, we begin by recalling that at its inception as well as in what is generally regarded as the most authoritative exposition of the doctrine in *Marine Midland*, the doctrine is said to be an equitable principle developed in the construction of the state long-arm statute involved in those cases and is expressly declared not to be a declaration of constitutional requirements of due process.

V.

Ordinarily, this declaration in *Marine Midland* that the doctrine is not of constitutional dimensions would seem dispositive of our problem. But a number of circuit and district court decisions have declared that the "fiduciary shield" doctrine is to be regarded as a "constitutional" principle based on due process under the Fourteenth Amendment. *Lehigh Valley Industries, Inc. v. Birenbaum*, 527 F.2d 87, 92-3 (2d Cir. 1975); *Weller v. Cromwell Oil Co.*, 504 F.2d 927, 929 (6th Cir. 1974); *Bulova Watch Co. v. K. Hattori & Co., supra*, 508 F.Supp. at 1348; *State Ex Rel. Miller v. Internal Energy, Etc., supra*, 324 N.W. 2d at 711. None of these cases, though, offered any exposition of a rationale for classifying the doctrine as an integral part of due process under the Fourteenth Amendment.[14] The Court in *Marine Midland*, did attempt to justify the doctrine on grounds of "fairness" and "fairness" is often spoken of as the common description of due process. *Guas v. Guas*, 146 N.J. Super. 541, 370 A.2d 91, 94 (1977). Even though the Court in *Marine Midland* expressly disclaimed any purpose by its expression of either stating or justifying the doctrine as a constitutional due process principle, it may be argued that the fairness rationale therein stated would support a ruling that the doctrine is an integral part of due process in this context. But the problem is that the reasoning stated in *Marine Midland*, on which it rested the "fairness" standard is unsatisfactory as an exegesis of constitutional reasoning. And the Court in *Marine Midland* seemed to have realized this for it immediately added to this statement of "under-

[14] See Sponsler, 35 Wash. & Lee L. Rev. supra at 361-62.

pinnings" for the doctrine the caveat that the doctrine was "not a constitutional principle." 664 F.2d at 902, n.3. Since, however, this is the only attempt at rationalization for the doctrine in the circuit court decisions stating the doctrine, it appears fair to assume that this was the only theory on which the doctrine was considered by those who, unlike *Marine Midland*, chose to classify it as a constitutional doctrine.

The reason or justification for the doctrine which the court declared in *Marine Midland* provided the "underpinnings" for the doctrine was "the notion that it is unfair to force an individual to defend a suit brought against him personally in a forum with which his only relevant contacts are acts performed not for his own benefit but for the benefit of his employer."[15] The court itself recognized, however, that there was a real contradiction in the rationale it had expounded for the "fiduciary shield" doctrine. Thus, after stating as the "undisputed" law that "an individual who commits a tort while acting in his capacity as a corporate officer or employee may be held personally liable," it conceded that "there is a dichotomy [created by the doctrine] between the principles governing

[15] This reasoning had been anticipated in Grove Press, Inc. v. Central Intelligence Agcy., 483 F.Supp. 132, 135 and 135-36, n. 3 (S.D. N.Y. 1980). In that case the Court said:

> "The rule articulated in cases like Unicon, . . . [250 F.Supp. 850], reflects a policy that it is unfair to subject an individual to jurisdiction on account of an act from which his employer derived the primary benefit."

The Court, also, observed, as did Marine Midland:

> "It is interesting to note, however, that a corporate officer remains liable for his own torts when even they are committed in his capacity as corporate officer [citing New York cases]. Thus the procedural law does not parallel the substantive law of torts in this respect." [250 F.Supp. 850].

the personal liability of corporate agents for torts committed in their corporate roles and the principles governing the amenability of such agents to personal jurisdiction solely on the basis of those acts." 664 F.2d at 902. That the "dichotomy" inherent in the application of the doctrine would create an "anomalous" result which would "defeat the purposes of the law creating substantive liability," if the courts were "to permit a corporate officer to shield himself from jurisdiction by means of the corporate entity, when he could not interpose the same shield as a defense against substantive liability" has been correctly pointed out and remarked on in *Donner v. Tams-Witmark Music Library, Inc.*, 480 F. Supp. 1229, 1234 (E.D. Pa. 1979); *Merkel Assoc., Inc. v. Bellofram Corp.*, 437 F.Supp. 612, 619 (W.D.N.Y. 1977).[16] The doctrine, realistically considered, would render a resident agent liable for his tort committed in his corporate role but would, in effect, by giving him immunity from service, provide the nonresident agent who has come into the state and committed a tort but then left the state with actual immunity

[16] In Merkel, the court said:

"The 'fiduciary shield' is, however, inappropriate where a corporate officer 'commits a tortious act within the state' within the purview of CPLR § 302(a)(2) [i.e., the New York long-arm statute] [citing case]. If a foreign corporation sends an employee into New York State to deliver certain goods and the employee physically assaults and batters a citizen of New York State, certainly there is no question that New York could exercise jurisdiction over such an employee. Conceptually, there is no reason to treat a corporate officer differently because he commits a 'business tort' in New York."

In Marine Midland, this language of Merkel was said "except as tempered by the principles" in that case, to be "not the prevailing view." 664 F.2d at 902. However, as we later indicate, the language of Merkel will accord with the result in all the Circuit Court decisions which at the time purported to apply the doctrine.

from liability for his tort.[17] It does not appear logical or reasonable or even to comport with the legislative philosophy inherent in the long-arm statutory procedure itself to hold that one may be held liable substantively for a tort he commits in his fiduciary role *in* the forum state but the court of the forum state may not, under its long-arm statute, require him to appear and defend the suit arising out of that tort in the forum state.

The same reason that would find service without the state unfair in the case simply because the agent was acting solely for the benefit of his employer should equally find service unfair, it would also seem, even when accomplished fortuitously by personal service within the forum state. The non-resident agent who was served personally while visiting in the forum state for a tort committed by him in his corporate role in that state took this very position and invoked the fiduciary shield doctrine as a ground for voiding that service in *Oxman's Erwin Meat Co., v. Blacketer*, 86 Wis. 2d 683, 273 N.W. 2d 285, 289 (1979). In dismissing the contention, the court said:

> "We believe it reasonable, just and consistent with traditional notions of fair play that Blacketer — whether or not he acted as a corporte officer — be subjected to suit in Wisconsin to enforce personal liability arising from an alleged tortious act he committed while personally present in the state.
>
> "If Blacketer drove the corporation's car and had an automobile accident in Wisconsin injuring a Wisconsin citizen, there would be no question that Wis-

[17] Cf., Donsco, Inc. v. Casper Corp., supra, 587 F.2d at 606.

"A corporate officer is individually liable for the torts he personally commits and cannot shield himself behind a corporation when *he is the actual participant in the tort" (Italics added).*

consin could exercise jurisdiction over him. We see no reason for treating Blacketer differently when the cause of action in tort is based on an alleged misrepresentation."

We find the rationale enuciated in *Marine Midland*, irrespective of its merits as a justification for an equitable doctrine to be applied by a state in the construction of its own statute, plainly insufficient to support a decision that jurisdiction over a non-resident corporate agent who has in his fiduciary capacity committed a tort in a forum state may not be acquired under the forum long-arm statute which is as broad as due process itself solely on constitutional due process grounds. That is not to say that the amenability of a non-resident corporate agent to long-arm service is always the same as that of his corporate employer. There are situations where the corporation may be amenable and the agent is not under sound due process reasoning. The circumstances under which the corporation may be amenable and the agent not are accurately illustrated in the decision of the court in *Idaho Potato Com'n v. Washington Potato Com'n.*, 410 F. Supp. 171, 182 (D. Idaho 1976).

In *Idaho Potato*, the court distinguished between the situation where the non-resident agent had come into the forum state and committed there the alleged tort and that where the non-resident agent had never been in the state and had no causal connection within the state with the alleged tort. In the first situation, it would find clear amenability to jurisdiction under the forum's long-arm statute. It said:

"If Corporation A from State X sends Employee B

> into State Y to deliver certain products, and B crashes his delivery truck, injuring Resident C in State Y, then jurisdiction over both A and B exists in State Y. The result flows from the commission of a tortious act within the purview of State Y's long-arm statute." *Id.* at 182.

On the other hand, it would deny amenability to jurisdiction over an agent whose activities occured without the forum state, though those activities may have had an effect in the forum state. In so doing it recognized the difference between the amenability of the corporate employer and the corporate agent. It found that it was proper under the principles of "fair play" and "substantial justice" "to hold that a corporation which engages in activities having [foreseeable] ramifications beyond the state in which it is physically present may have sufficient connection [or "contacts"] with a distant forum where the ramifications are felt"[18] but that "it is quite another matter to hold that an individual working for that same corporation, who has never been present in the distant forum with regard to a corporate transaction, [and has no reason to foresee responsibility in the forum state] has a similar connection [or "contacts"] with the distant forum." In essence, what the court in *Idaho Potato* held was that when the corporate agent has not committed a tort in the forum state his foreseeable "contacts" with that state are too tenuous to establish those "minimum contacts" essential for jurisdiction but that if the agent has come into the forum and while there has committed a tort, whether for his personal benefit or for the benefit of his employer he

[18] See the language of the court in Hanson v. Denckla, 357 U.S. at 250-51 and Woodson, supra, 444 U.S. at 297.

has thereby "purposely avail[ed] [himself] of the laws of another state" and of the privilege of conducting activities within the forum state, it seems that his being called on to respond for his tort in the forum state is sufficiently foreseeable to sustain jurisdiction over him under the state long-arm statute. *Id.* at 182-83.

This distinction, as explicated in *Idaho Potato* is a very reasonable one and one which is consistent with due process reasoning in the context of determining the constitutionality of long-arm jurisdiction generally. In *Woodson*, the Supreme Court said that the "concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum . . . ." 444 U.S. at 291-92. If the agent has never been in the forum state and has had no "causal connection" with the alleged tort and has no reason to foresee being made amenable to suit therein, it would be unfair to require him to come to such state to defend a tortious act not participated in by him in that state but that same reasoning would not apply to a corporation carrying on an interstate business whose tortious conduct had had a harmful result in the state. However, where the agent has come into the state and has actually committed the tort which forms the gravamen of the cause of action within the state, it is not unfair to require him to defend in the exact forum state where he committed that tort and where he availed himself of the privileges of the state.[19] In

[19] See Graber v. Prelin Industries, Inc., 368 F.Supp. 1358, 1364 (D.S.D. 1974), where the Court said in this connection that "if [the individual] defendants could afford to travel to various states for promotional meetings, they should be able to do so to defend suits brought against them" in those states.

the latter instance, there can be no due process violation in an exercise of jurisdiction over the non-resident agent by the forum state.

VI

It is interesting that this rule on the scope of the fiduciary shield doctrine, as developed in *Idaho Potato*, would be consistent with most of the decisions in which the doctrine has been invoked as well as with those decisions which proceeded strictly along lines of constitutional analysis without reference to the fiduciary shield doctrine. Thus, the three federal courts of appeals decisions which are most often cited as illustrative of the application of the doctrine as a constitutional principle would fit comfortably within the *ratio decidendi*, stated in *Idaho Potato, Lehigh Valley Industries, Inc. v. Birenbaum, supra*, 527 F.2d at 87; *Wilshire Oil Company of Texas v. Riffe*, 409 F.2d 1277 (10th Cir. 1969); and *Weller v. Cromwell Oil Co., supra*, 504 F.2d at 927. Though all of them stated the doctrine, not a one of them can be said to have been decided under the expansive language of the doctrine and the decision in each was rested expressly upon the fact that the agent had not actually and individually participated in a tort in the forum state.[20] Thus, in *Lehigh*

[20] In Marine Midland itself, the dismissal of the action under the fiduciary shield doctrine by the district court (as a matter of statutory construction and not constitutional principle) was reversed, but the actual application of the doctrine in that case was somewhat obscure and the comment of the Court suggests that the actual result may have been thought applicable solely on the basis of the facts of the case (i.e., that the misrepresentation was "negligent" and not "fraudulent") for the Court said:

> "In any event, given the rationale for the fiduciary shield doctrine, we think it obvious that the doctrine should be applied where the tort alleged is *negligent* misrepresentation and the statements attributed to the corporate agent consisted of no more than con-

Valley Industries, Inc. v. Birenbaum, the Court said, "[t]he issue before us is not whether plaintiffs might succeed on the merits of this claim but whether or not the tort occurred in New York." It then declared the individual agent in that case was immune from service under the New York long-arm statute because of plaintiffs' "failure . . . to establish any basis for finding that Norman [the agent] committed any tortious activity in New York . . . ." 527 F.2d at 92 and 94. It also responded to the contention of the plaintiffs that, while the tort may have been committed in Massachusetts, the result was injury to "person or property within [New York]" by saying that the long-arm statute in question required direct injury in the forum state and that "remote or consequential" damages would not suffice. 527 F.2d at 94. In *Wilshire Oil Company of Texas v. Riffe, supra*, 409 F.2d at 1281, the Court dismissed the action against the individual defendant because the plaintiff had "failed to prove a sufficient nexus between the submission of the bid [which was the sole contact of the agent with the forum state] and its claim against [the agent] Homer Riffe."[21] In *Weller v. Cromwell Oil Company, supra*, 504 F.2d at 929, the Court, while stating the fiduciary shield doctrine, rested its dismissal of the action against the individual

fn. 20 (continued)
firmations and reiterations of the corporation's own statements" (Italics added). 664 F.2d at 902-03.

Even on that basis, the Court held that the district court should on remand consider whether, under its relaxed standard for disregarding the corporate shield, the defendant was properly amenable to jurisdiction under the equitable principles attached by it to the New York long-arm statute.

[21] That this is the limited scope of Riffe under Kansas law, see Professional Investors Life Ins. Co. v. Roussel, 445 F.Supp. 687, 696-98 (D.Kan. 1978).

defendants-agents on the fact that such defendants "were never in the state of Ohio to commit any act or omission."

The same basis of decision as reflected in these Courts of Appeals decisions is true generally, too, of the District Court cases in which the fiduciary shield doctrine has been spoken of as a constitutional rule. Thus, in *Bloom v. A. H. Pond Co., Inc.*, 519 F.Supp. 1162 (S.D.Fla. 1981), the Court found no basis for long-arm jurisdiction because "there has been no nexus established between the individual defendants and this state" beyond "the fact that they are employed by a corporate defendant that is subject to jurisdiction for doing business in Florida." *Id.*, at 1170. Again, in *Techno Corp. v. Dahl Associates, Inc.*, 521 F.Supp, 1036 (W.D.Pa. 1981), the claim against the corporate officers was dismissed because all the relevant activities of such acts "were tortious acts committed outside Pennsylvania . . . ." *Id.*, at 1037. *See also, Kinstler v. Saturday Evening Post Co.*, 507 F. Supp. 113, 115 (S.D.N.Y. 1981) (Even under the fiduciary shield doctrine, non-resident agent who commits a tort in the forum state must anticipate that "her activities [will be held to be such] that she should have foreseen consequences in this forum" and thus would be amenable to jurisdiction in the forum state); *Agra Chem. Dist. Co. v. Marion Laboratories, Inc.*, 523 F.Supp. 699, 703 (W.D.N.Y. 1981) ("This fiduciary shield will not protect the [corporate] officer [from amenability under the state long-arm statute] however, if he or she has committed a tortious act within the state"); *Knorr Brake Corp. v. Harbil, Inc.*, 550 F.Supp. 476, 479 (N.D.Ill. 1982) ("Harbil encounters a like problem in claiming the individuals committed tortious acts in Illinois. Again it

identifies no specific Illinois acts by specific individuals"); *Chancellor v. Lawrence*, 501 F.Supp. 997, 1003-05 (N.D.Ill. 1980) (" . . . if substantial justice and fundamental fairness is [sic] the standard, the Court cannot accept the conclusion that the mere fact that defendants' actions were taken in their corporate rather than individual capacities must alter the result . . . . defendants' conduct and connections to Illinois were such that they could reasonably anticipate being haled into court in Illinois in this action [citing *Woodson*, 444 U.S. at 297]." p. 1005); and *Hyatt Intern. v. Inversiones Los Jabillos, C.A.*, 558 F.Supp. 932, 935 (N.D.Ill 1982) (the tort did not arise from the defendant's agent's activities within the state).[22]

VII

Beyond that, the doctrine, confined as *Idaho Potato*

[22] Illinois is second only to New York in the number of cases in which the "fiduciary shield" doctrine has been raised. In all of these Illinois cases, though, the real basis of decision is, not the bare language of the doctrine but the absence of any contacts of the individual agent in Illinois with the alleged tort. Thus, in Hurletron v. Whittier, Inc. v. Barda, 82 Ill. App. 3d 443, 402 N.E. 2d 840 (1980), the agent sued was relieved of amenability of service because it was found that he "had no meaningful contacts with Illinois" since his limited contacts had "no connection with the operative facts, . . . which gave rise to the claim . . . ." Id., at 843. Mergenthaler Linotype Co. v. Leonard Storch Enterprises, 66 Ill.App.3d 789, 383 N.E.2d 1379 (1978) is similar. Storch, the officer in this case, was in Illinois on but two occasions and "the cause of action did not arise out of those two visits." Id., at 1385. In Green v. Advance Ross Electronics Corp., 86 Ill. 2d 431, 427 N.E.2d 1203 (1981), the alleged "misconduct of [the corporate officer] took place outside Illinois" but it was the plaintiff's theory that "the consequences of his misconduct were felt in Illinois" and that, under the latter theory, the officer could be held subject to service under the Illinois long-arm statute. Proceeding under constitutional principles and not under the "fiduciary shield" doctrine, the court found that attempted long-arm jurisdiction over the officer who had not been in Illinois and whose alleged misconduct took place in Texas would offend due process. 427 N.E.2d at 1207-08.

did, would accord with the decisions in those jurisdictions which apparently have not accepted the "fidicuary shield" doctrine — at least they have not cast their *ratio decidendi* in the terms of the doctrine. Typical of these decisions is *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902. There, the plaintiff, employed in a plant of the defendant Ortho in Puerto Rico, claimed to have sustained injuries as a result of negligent contamination in the plant environment. He sued Ortho, a New Jersey corporation, and its officers and directors, all residents of New Jersey, making service upon them under the Puerto Rico long-arm statute. The court dismissed the service upon the individual defendants because of the failure of the plaintiff to show any "direct personal involvement by the corporate officer in some decision or action which [was] causally related to plaintiff's injury" in Puerto Rico, *Id.*, at 907. At no point in its opinion did the court advert to the so-called "fiduciary shield" doctrine and it rested its decision, granting immunity from jurisdiction to the agents under the Puerto Rico long-arm statute, solely because of a lack of their personal involvement in the tortious activity in Puerto Rico.

In reaching this decision, the court in *Ortho* relied heavily on the fact that, as stated in 3A Fletcher Cyc. Corp. §1137, p. 207 (1975), and in most decisions, that an officer of a corporation who takes no part in the commission of the tort committed by the corporation is not personally liable to third persons for such a tort.[23] It seemed to

[23] This rule was recently recognized by us in Tillman v. Wheaton-Haven Recreation Ass'n., Inc., 517 F.2d at 1144. See also Donsco, Inc. v. Casper Corp., 587 F.2d at 606.

equate amenability to long-arm jurisdiction with substantive liability in tort of the agent and thus avoided largely the "dichotomy" that disturbed the Court in *Marine Midland*. It said: "What is required is some showing of direct, personal involvement by the corporate officer in some decision or action which is causally related to the plaintiff's injury." *Id.*, at 907. Such "direct personal involvement" typically existed, the Court said, "where the defendant [agent] was the 'guiding spirit' behind the wrongful conduct (citing case), or the 'central figure' in the challenged corporate activity' (citing case)." *Id.*, at 902. Since the individual defendants were found to have had no "direct personal involvement" in any tort in Puerto Rico and thus no "contacts" within the *Woodson* rule between the forum jurisdiction and the individual defendants, there was no valid jurisdiction acquired over those defendants in the Puerto Rico court as a result of service under the Puerto Rico long-arm statute. *Ortho* is accordingly consistent with the rule declared in *Idaho Potato*.[24]

The rule thus applied in *Ortho* is one that is easily understood and one which manifestly harmonizes the rule with reference to the substantive tort liability of a corporate agent and that with reference to his amenability to service in an action for tort under a state long-arm statute and removes the "dichotomy" that *Marine Midland* found disturbing in the application of the "fiduciary shield" doctrine. Under such a rule as was followed in *Ortho*, so long as the agent has not participated in the

[24] See also, Brown v. Flowers Industries, Inc., 688 F.2d 328, 333 (5th Cir. 1982), U.S.appeal pending.

alleged tort in the forum state, he is immune from suit on such tort both under general corporate law and under the state long-arm statute but if he has a "direct personal involvement" in a tort committed in the forum state, the agent is subject to jurisdiction in that state under its long-arm statute.

VIII

We do not mean to intimate that there are not district court decisions which may be said to be contrary to those cited by us. Illustrative of these are *Bulova Watch Co. Inc. v. Hattori & Co., Ltd., supra,* 508 F.Supp. 1322; *Fashion Two Twenty, Inc. v. Steinberg,* 339 F.Supp. 836, 841-42 (E.D. N.Y. 1971); and *State Secur. Ins. Co. v. Frank B. Hall & Co., Inc.,* 530 F.Supp. 94 (N.D. Ill. 1981). However, many of those cases are not as clear as might be claimed. In *Bulova Watch,* for instance, there were four individual defendants. Two of them (Segal and Murphy) were said to have had "no personal contacts" with New York and a third (Waldman) was said to have been "only secondarily" involved. The only defendant who had had "minimum contacts" in New York with the alleged cause of action was the defendant Moriya, who was a Japanese resident. The court sustained for *equitable* reasons Moriya's motion to quash. These equitable considerations were stated by the court to be as follows (508 F.Supp. at 1349):

> "He (Moriya) should be protected by the fiduciary shield doctrine from having to come half-way around the world to defend a case which will in any event be defended by the party on whose behalf his actions were allegedly taken. In the case of Moriya, the unique burdens that would be imposed on the defendant,

> and our holding that the corporate employer is subject to our jurisdictions tip the balance decisively in favor of dismissal."

As we later indicate, our case presents no such equities in favor of the non-resident agent. Similarly, in *Steinberg*, it seems that "the harmful results of which plaintiff complains did not occur in New York." 339 F.Supp. at 842. *Hall, supra,* 530 F.Supp. 94, was decided on what it understood to be Illinois law, though it did note the due process issue which it incorrectly assumed to have been decided in *Bulova Watch*. All these cases suggest that almost uniformly the cases in which the "fiduciary shield" doctrine has been stated as a principle and applied have been cases in which the individual defendants had not committed a tort in the forum state or their acts had had no causal connection with the plaintiff's alleged cause of action or where, as in *Bulova Watch*, the court concluded that equitably the plaintiff was adequately protected by the presence of the agent's employer as a defendant, without imposing a "unique" hardship on the individual defendant by requiring him to travel "halfway around the world" to defend a personal suit, where the plaintiff could obtain full satisfaction in his action against the employer.

After canvassing the reasoning of the various courts which have sought to provide a reasoned analysis of the question, we are persuaded that when a non-resident corporate agent is sued for a tort committed by him in his corporate capacity in the forum state in which service is made upon him without the forum under the applicable state long-arm statute as authorized by Rule 4(e), he is properly subject to the jurisdiction of the forum court,

provided the long-arm statute of the forum state is co-extensive with the full reach of due process. On the other hand, if the claim against the corporate agent rests on nothing more than that he is an officer or employee of the non-resident corporation and if any connection he had with the commission of the tort occurred without the forum state, we agree that, under sound due process principles, the nexus between the corporate agent and the forum state is too tenuous to support jurisdiction over the agent personally by reason of service under the long-arm statute of the forum state. In reaching this conclusion, we are influenced strongly by the consideration that this application of the rule of amenability to jurisdiction as adopted removes that contradiction or "dichotomy" perceived by *Marine Midland* "between the principles governing the personal liability of corporate agents for torts committed in their corporate roles and the principles governing the amenability of such agents to personal jurisdiction solely on the basis of those acts." (664 F.2d at 902) Moreover, it follows more traditional lines of due process analysis.

It is obvious that, under the rule adopted by us, there is no question of the amenability of Pearson to the jurisdiction of the forum court in this case. To repeat: He committed the alleged tort within the forum state and it is unimportant in those circumstances whether he was acting at the time in his corporate or personal role. The result would be different had Pearson's connection with the tortious action been conducted without the forum state as was the situation in *Ortho.*

Under the facts of this particular case, we believe too that the "equitable" rule declared in *Marine Midland* and applied in *Bulova Watch* would support jurisdiction over Pearson. This is a "unique," if not bizarre, case. The corporate defendant is a national bank, which, under the often criticized "horse-and-buggy" section 94 of the National Bank Act,[25] is permitted to engage in lending on and owning real estate in South Carolina, but, unlike any other corporations or individuals, without any amenability to suit in the latter state. The bank in this case has invoked that right of immunity given it under Section 94 and has been dismissed as a defendant. It has gone further by asking that its agent who personally committed the tort in his fiduciary role be given immunity from jurisdiction in a suit in South Carolina on account of his alleged tort in that State. In short, under its position which is sustained by Section 94, an out-of-state national bank can come into a state, engage in business in that state and, in the course of such business, commit a tort through its agents sent into that state without being subject to any process in that state against it for that tortious activity. Under that theory, so far as jurisdiction of a South Carolina court for a tort committed by it in that State is concerned, the bank in this case is a "no-person," a mere name or corporate shell. This would seem to be a situation that fitted the situation contemplated by *Marine Midland* where it said that, if the corporate defendant was not responsive, the "fiduciary shield" doctrine could be disregarded. Certainly, this case presents that type of situation in which it would be inequitable to permit the

[25] Aetna Casualty & Surety Company v. Graves, 381 F.Supp. 1159, 1161 (W.D. La. 1974).

bank and its agent to invoke the "corporate shield" doctrine as a defense against jurisdiction over the agent who had committed the tort. Moreover, it presents a situation different from *Bulova Watch*, where the court, treating the "fiduciary shield" doctrine as an equitable principle and balancing the equities of the parties, found that, because the agent's employer was amenable to jurisdiction and was responsive to judgment, the balance "tipped" in favor of the agent. In this case, equity balances against the agent's position, since the employer is immune from jurisdiction and the only tortfeasor amenable to the forum court's jurisdiction is the agent Pearson. Accordingly, even under the "fiduciary shield" doctrine as adumbrated in *Marine Midland*, and as applied in *Bulova Watch*, jurisdiction in the forum court over Pearson would exist in this case.

The judgment of the District Court dismissing the action against the defendant Pearson is reversed and the cause is remanded to the District Court for further proceedings consistent herewith.

REVERSED
and
REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
Columbia Division
Civil Action No. 82-1617-0

Columbia Briargate Company,

Plaintiff,

vs.

First National Bank In Dallas,
Vaughn Pearson, and
A. S. Kyzer, Jr.,

Defendants.

Order

This matter is before the Court upon the motion of defendants First National Bank in Dallas (the Bank) and Vaughn Pearson to dismiss the action as to them for (a) lack of personal jurisdiction (F.R.C.P. 12(b)(2)), and (b) improper venue (F.R.C.P. 12(b)(3)).[1] Alternatively, the Bank and Pearson moved the Court to transfer this action pursuant to 28 U.S.C. §1404(a) to the United States District Court for the Northern District of Texas, Dallas Division. The Court heard oral arguments on September 28, 1982, and after careful consideration of the memoranda, affidavits and arguments of the respective parties, it is of the opinion that the motion to dismiss should be granted.

[1] In its original motion, the Bank and Pearson moved additionally to dismiss the present action for lack of subject matter jurisdiction due to the failure of plaintiff Columbia Briargate Company (Briargate) to properly allege diversity jurisdiction. Subsequent to service of the original rule 12(b) motion of the Bank and Pearson, Briargate amended its complaint to correct the defective allegations identified by the defendants.

The dispute involves a contract for the sale of certain apartments located in South Carolina, which contract was entered into on or about June 19, 1979, between the Bank as seller, and Selden Ring, as purchaser. The contract was closed on or about September 11, 1979 and Selden Ring thereupon took possession of the property.[2] Pearson, an officer and authorized representative of the Bank, negotiated and executed the contract on behalf of the Bank and later represented the Bank at the closing. Thereafter, according to Briargate, it began to experience certain problems with the apartments and, as a result, it brought the present action against the Bank, Pearson and A.S. Kyzer, Jr. seeking to recover damages for an alleged breach of the contract of sale and fraud in connection with the sale. In response to the complaint, the Bank and Pearson filed their motion to dismiss together with a supporting affidavit of Pearson.

The jurisdictional facts relevant to this Court's determination of the instant motion are easily summarized and, for the most part, undisputed. The Bank is a national banking association which is established and has its principal place of business in Dallas, Texas. Pearson is an individual resident of Texas, whose only contacts with the State of South Carolina arose out of his involvement in the negotiation and sale of the apartments on behalf of the Bank. Most significantly, according to the sworn testimony in Pearson's affidavit, all acts Pearson performed in connection with the sale of the apartments were undertaken by him in a representative capacity on behalf of the

[2] Subsequently, Ring sold or otherwise transferred the apartments to their present owner, Briargate, the plaintiff in the present action.

Bank and for its benefit, rather than for Pearson's own personal benefit. Briargate has produced no evidence whatsoever to rebut these sworn statements by Pearson in his affidavit.

A. The Motion of the Bank

The Bank asserts that it is entitled to dismissal pursuant to the provisions of section 94 of the National Bank Act, 12 U.S.C. §94, which provides as follows:

> "Actions and proceedings against any association under this chapter may be had in any district or Territorial Court in the United States held within the district in which such association may be established . . ."

This provision is clear and unambiguous, and it has long been settled that suits filed in federal court against a national bank must be brought in the district in which the bank is established. Indeed, almost twenty years ago, the Supreme Court, in *Mercantile National Bank at Dallas v. Langdeau*, 371 U.S. 555, 562 (1963), held that §94 was a mandatory venue provision. Thus, the Court concluded "in those courts [specified in §94] alone, [can] a national bank be sued against its will." 371 U.S. at 560.

It is undisputed that the Bank is a national banking association. It is likewise undisputed that the Bank is established, as that term is used in §94, in Dallas, Texas, which is the location of the Bank as specified in its Charter from the Comptroller of the Currency, and the city wherein its principal office is located. Pearson Affidavit, ¶¶ 2 and 3 and Exhibit A. Therefore, the proper venue for an action against the Bank is the Dallas Division of the Northern District of Texas. In light of these uncontra-

dicted facts, this Court is mandated by § 94 to dismiss the Bank from this action.[3]

B. The Motion of Pearson

Pearson asserts that his only contacts with South Carolina were contacts he made in performance of his duties as an officer of the Bank. In support of his motion, Pearson filed an affidavit wherein he testified that "all of my contacts with the State of South Carolina and all acts committed by me in connection with the sale of the Briargate Apartments were undertaken by me in a representative capacity on behalf of the Bank for its benefit, and not for my own personal benefit." Pearson Affidavit, ¶ 7.

Briargate originally alleged that Pearson negotiated and executed the subject contract and closed the transaction "in his capacity as an agent of [the Bank] while acting in behalf of and pursuant to the authority of [the Bank]". Complaint ¶ III. Subsequently, in an effort to defeat Pearson's motion, Briargate amended its complaint to include an allegation that Pearson, when negotiating and executing the subject contract, was acting not only as representative of the Bank, but in his individual capacity as well. However, Briargate failed to provide any evidence to substantiate this allegation.

It is elementary that a plaintiff faced with a properly supported motion to dismiss pursuant to Rule 12(b)(2) has the burden to go beyond the pleadings and present affirmative proof to establish personal jurisdiction. *See*

[3] During the hearing, plaintiff indicated a desire to take a voluntary nonsuit as to the Bank. However, the Bank requested that its dismissal be based on its motion rather than on plaintiff's request for a voluntary nonsuit. Therefore, the Court will deny plaintiff's request for a nonsuit and grant the Bank's motion to dismiss.

Chlebda v. H. E. Fortna and Brothers, Inc., 609 F.2d 1022, 1024 (1st Cir. 1979); *Weller v. Cromwell Oil Company*, 504 F.2d 927, 929-30 (6th Cir. 1974). Thus, while the court is normally to accept the allegations of the complaint as true, the plaintiff may not rely on those allegations in the face of specific contradictions set forth in defendant's motion supported by affidavits. Instead, the plaintiff must then respond by affidavit or by otherwise presenting specific facts which demonstrate that the court does have jurisdiction. *In Re Arthur Treacher's Franchisee Litigation*, 92 F.R.D. 398, 410 n. 11 (E.D. Pa. 1981), and cases cited therein. *See also* 5 Wright & Miller, *Federal Practice and Procedure* §1351, at 565-68 (1969). Briargate has failed to meet this burden.

The only evidence before the Court is the uncontroverted testimony in Pearson's affidavit that his only contacts with this state arose out of his activities on behalf of the Bank. Moreover, the contract itself, attached as an exhibit to Briargate's complaint, reveals that Pearson signed as a representative of the Bank. In light of this undisputed evidence, therefore, Briargate's mere allegation that Pearson acted individually for his own benefit in connection with the sale of the property is insufficient to defeat Pearson's motion. Moreover, to the extent such a finding of fact is necessary to this Court's decision, the Court finds that Pearson acted wholly in a representative capacity on behalf of the Bank in all of his negotiations with the plaintiff and any other contacts he may have had with the State of South Carolina.

Nevertheless, the question remains whether this Court

can assert jurisdiction over Pearson when his only contacts with this state were contacts made in a representative capacity. For the reasons set forth below, the Court is of the opinion that Pearson's contacts are not sufficient to justify the exercise of personal jurisdiction over him.

It is well settled that the plaintiff has the burden of establishing personal jurisdiction over the defendant. *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 490 (5th Cir. 1974); *Pardo v. Wilson Line of Washington, Inc.*, 414 F.2d 1145, 1149-50 (D.C. Cir. 1969). Briargate asserts jurisdiction pursuant to South Carolina's long-arm statute, South Carolina Code § 36-2-803 (1976), which permits the exercise of personal jurisdiction by South Carolina courts over a person who commits a tortious act in whole or in part in South Carolina. Although Section 36-2-803 purports to extend jurisdiction of South Carolina courts as far as due process allows, *Hardy v. Pioneer Parachute Co., Inc.*, 531 F.2d 193, 195 (4th Cir. 1976), Briargate has cited no authority to the Court, and indeed none can be found, for the proposition that the South Carolina long-arm statute intends to reach individual officers or employees of a corporate principal whose only contacts with the state arose from acts committed solely in a representative capacity on behalf of their corporate principal. The Court has grave doubts whether the South Carolina General Assembly, by enacting Section 36-2-803, intended to reach such conduct and, therefore, we refuse to so hold. More importantly, however, Pearson's motion raises an issue of constitutional dimension. In this connection, notwithstanding the Court's interpretation of the South Carolina long-arm statute, the Court finds additionally

that the exercise of personal jurisdiction over Pearson in the present action would not comport with the due process requirements of the fourteenth amendment.

Due process permits the court of a forum state to exercise jurisdiction over a non-resident defendant only if that defendant has sufficient "minimum contacts" with the state such that "the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). In this connection, it has been universally held that the acts of an individual defendant within the forum which are committed solely in a representative capacity are insufficient contacts to support the exercise of jurisdiction over such individual personally. *E.g., Weller v. Cromwell Oil Co., supra; Wilshire Oil Co. of Texas v. Riffe*, 409 F.2d 1277, 1281 (10th Cir. 1969); *Bloom v. A. H. Pond Co.*, 519 F.Supp. 1162, 1170 (S.D. Fla. 1981); *Hoppenfeld v. Crook*, 498 S.W.2d 52 (Tex. Civ. App. 1973, writ ref'd n.r.e.). Thus, while the corporation itself may be properly amenable to service when it transacts business through agents operating in the forum state, unless the agents transact business on their own account and not on behalf of the corporation, the agents are not engaged in business so as to sustain an application of the long-arm statute as to them individually. *Bloom v. A. H. Pond Co., supra* at 1170; *see, e.g., Yardis Corp. v. Cirami*, 76 Misc.2d 793, 351 N.Y.S. 2d 586, 587 (1974).

In opposing Pearson's motion, Briargate relied on a number of South Carolina decisions, including *Little v. Robert G. Lassiter & Co.*, 156 S.C. 286, 156 S.E. 128 (1930), *Gilbert v. Mid-South Machinery Co., Inc.*, 267 S.C. 211,

227 S.E.2d 189, 193 (1976), and *Lawlor v. Scheper*, 232 S.C. 84, 101 S.E.2d 269 (1957), which provide that an agent may be held liable for his own tortious acts even though such acts were made in a representative capacity. None of these cases, however, involved questions of personal jurisdiction and, therefore, they are inapposite. There is a dichotomy between the principles governing the personal liability of corporate agents for torts committed in their corporate roles and the principles governing the amenability of such agents to personal jurisdiction solely on the basis of those acts. *See, e.g., Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 902 (2d Cir. 1981); *Lehigh Valley Industries v. Birenbaum*, 527 F.2d 87, 92-93 (2d Cir. 1975); *Bulova Watch Co. v. K. Hattori & Co.*, 508 F.Supp. 1322, 1347 (E.D. N.Y. 1981); *Stop-A-Flat Corp. v. Electra Start of Michigan*, 507 F.Supp. 647, 651 (E.D. Pa. 1981). These decisions recognize that an individual's contacts with a particular state by virtue of his acts as an officer of the corporation may not form the predicate for the exercise of jurisdiction over him as an individual, even if the acts might be sufficient to subject him to personal liability. The South Carolina decisions cited by Briargate are obviously not applicable to the issue before this Court since they deal with personal liability, not personal jurisdiction.

Additionally, apart from the highly technical consideration of "minimum contacts", courts have simply concluded that the exercise of jurisdiction over an individual does not comport with "fair play and substantial justice" where the individual engages in corporate business for the sole benefit of the corporation and conducts no activities on his own behalf. *See Bulova Watch Co. v. K. Hattori*

& Co., 508 F.Supp. 1322, 1347 (E.D.N.Y. 1981); *accord State Security Insurance Co. v. Frank B. Hall & Co.*, 530 F.Supp. 94 (N.D. Ill. 1981). Indeed, the court in *Marine Midland* emphasized that the well-recognized fiduciary shield doctrine is premised on traditional notions of fairness:

> "[I]t is unfair to force an individual to defend a suit brought against him personally in a forum with which his only relevant contacts are acts performed not for his own benefit but for the benefit of his employer." 664 F.2d at 902.

It is undisputed that Pearson's only contacts with South Carolina arose out of his activities there on behalf of the Bank in negotiating the property sale. Pearson Affidavit ¶¶ 6, 7. Consequently, because of established fiduciary shield principles, fully applicable here, Pearson is not amenable to the jurisdiction of this Court and the Court must dismiss the present action as to Pearson for lack of personal jurisdiction.

The Court additionally notes that even if it could reasonably be argued that Pearson was subject to the jurisdiction of this Court, there is a second compelling reason that justifies his dismissal. As previously stated, the Bank is entitled to dismissal under § 94. The policy considerations underlying § 94 likewise support its application in the present action against Pearson. Section 94 was enacted by Congress to prevent the inconvenience and disruption of a national bank's business that might result if the Bank was forced to defend itself or if it was compelled to produce its records in distant litigation. *See Citizens and Southern National Bank v. Bougas*, 434 U.S. 35,

44 (1977); *First National Bank and Trust Company in Macon v. American Security and Trust Co.*, 437 F.Supp. 771, 772 (D.D.C. 1977). However, if Briargate were able to single out representatives of the Bank such as Pearson, who acted on its behalf in this transaction, and force those representatives to defend themselves in a distant forum, thereby necessitating production of the Bank's records in such forum, the protection afforded the Bank by § 94 would be effectively undermined and the continuity in the Bank's business, which is the goal sought through § 94, would be disrupted. Therefore, even if this Court could assert personal jurisdiction over Pearson, it would still be obligated to dismiss Pearson pursuant to 12 U.S.C. § 94.

For the foregoing reasons and based on the cited authorities, it is the opinion of the Court that the motion of defendants First National Bank in Dallas and Vaughn Pearson to dismiss is well taken.

IT IS, THEREFORE, ORDERED that the motion of the defendant First National Bank in Dallas to dismiss the complaint against it pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure for improper venue be and the same is hereby granted; the motion of defendant Vaughn Pearson to dismiss the complaint against him pursuant to Rules 12(b)(2) and (3) of the Federal Rules of Civil Procedure for lack of personal jurisdiction and improper venue be and the same is hereby granted; and the Court further determines pursuant to F.R.C.P. 54(b) that there is no just reason for delay of entry of judgment for these defendants, therefore it is directed that final

judgment be entered on behalf of both the Bank and Pearson.

IT IS SO ORDERED at Columbia, South Carolina this 14th day of October, 1982.

Honorable Matthew J. Perry
United States District Judge

APPENDIX C

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JUDGMENT

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

Civil Action No. 82-2054

Columbia Briargate Company,
a limited partnership,

Appellant,

vs.

First National Bank In Dallas,
Vaughn Pearson, and
A. S. Kyzer, Jr.,

Appellees

Appeal from the United States District Court for the District of South Carolina.

This cause came on to be heard on the record from the United States District Court for the District of South Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of said District Court appealed from, in this cause, be, and the same is hereby, reversed. The case is remanded to the United States District Court for the District of South Carolina at Columbia for further proceedings consistent with the Opinion of this Court filed herewith.

/s/ William K. Slate II
Clerk

83-895

NO.

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1983

VAUGHN PEARSON,

PETITIONER,

v.

COLUMBIA BRIARGATE COMPANY,

RESPONDENT.

Petition for Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

Respondent's Brief in Opposition

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ARGUMENT IN OPPOSITION TO WRIT

Petitioner Vaughn Pearson's Statement of the Case and Question Presented are misleading in that they give the impression that Pearson was a passive agent for the Bank with only minimal contacts with the forum state. This was not the case. All of the activities which formed the gravaman of the cause of action were performed by Pearson while he was in the State of South Carolina (App. A-6).

Pearson's basis for the Writ is that the Court of Appeals' decision conflicts with the decisions of other Circuits. He cites the following cases to support this argument: Marine Midland Bank, N.A. v. Miller, 664 F.2d 899 (2nd Cir. 1981); Lehigh Valley Industries, Inc. v. Birenbaum, 527 F.2d

87 (2nd Cir. 1975); Weller v. Cromwell Oil Co., 504 F.2d 927 (6th Cir. 1974); Wilshire Oil Co. of Texas v. Riffe, 409 F.2d 1277 (10th Cir. 1969). The decision of the Fourth Circuit Court of Appeals, however, is not in conflict with the other courts. The decision of the Court of Appeals goes into considerable detail to distinguish these cases from the case at bar on the grounds that the agent had not actually and/or individually participated in a tort in the forum state (App. A-23).

In Weller v. Cromwell Oil Co., supra, the Court pointed out that the individual defendants (corporate agents) were never in the forum state. All contacts with the forum state were through the mails and by telephone. The Court

held that such contacts were insufficient to allow the exercise of in personam jurisdiction over the individual defendants and rested its dismissal of the action against the individual defendants on the fact that such defendants ". . . were never in the State of Ohio to commit any act or omission."

The court in Wilshire Oil Co. of Texas v. Riffe, supra determined that the activities which brought the individual corporate agents within the long-arm statute were unrelated to the cause of action that was the basis for the suit. The plaintiffs in Lehigh Valley Industries, Inc. v. Birenbaum, supra failed to provide evidence that the individual agent committed any tortious activity in the forum state.

This is in contrast to the case at bar where all of Pearson's tortious acts were committed in the forum state.

To allege that the Court of Appeals decision is in conflict with the other Circuits that have considered the question of the fiduciary shield doctrine is to ignore the facts and rationale of the Court's lengthy opinion.

Petitioner further argues that the fiduciary shield doctrine is one of constitutional dimensions which was disregarded by the Court of Appeals. Petitioner relies heavily on the case of Marine Midland Bank, N.A. v. Miller, supra in support of its theory. Petitioner ignores the fact that the Court in Marine Midland Bank specifically stated that: "The fiduciary shield doctrine is not a constitutional

principal but is rather a doctrine based on judicial inference as to the intended scope of the long-arm statute." The Court went further and characterized the doctrine not as a matter of statutory construction but rather as an "equitable doctrine" under the long-arm statute. It is not to be applied inflexibly or "mechanically" but rather to be applied by the Court with a "sound exercise of discretion" in order to achieve the ultimate purpose of "fairness" arising out of an "analysis of the particular facts of the case." (App. A-11).

A major part of the Court's opinion examines the constitutional issues raised by the Petitioner in its brief below. The Court of Appeals cites numerous cases to support the finding that the fiduciary shield doctrine is

not one founded on constitutional interpretation but rather statutory construction and/or traditional notions of "fairplay." (See App. A-9 - A-23). Nevertheless, the Court of Appeals did review the due process requirements established by the Supreme Court for acquiring jurisdiction in a forum state over a non-resident corporate agent under a state's long-arm statute. The Court of Appeals found that Pearson had sufficient minimum contacts with the forum state to satisfy the due process requirements. The Court found that it was not unfair to subject an individual corporate agent to in personam jurisdiction where he physically enters the forum state and commits a tort while in the state.

CONCLUSION

To accept Petitioner's test for fairness and due process would be to accept a new standard that has not been established by any court. The so-called fiduciary shield doctrine is really nothing more than a new name for the fairness doctrine established years ago in the case of International Shoe Co. v. Washington, 326 U.S. 310 (1945). For the foregoing reasons, the Writ of Certiorari should be denied.

Respectfully submitted,

COOPER, BOWEN, BEARD & SMOOT

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December 23, 1983

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit have been furnished by mail to Ernest E. Figari, Jr., Esquire, 4700 InterFirst Two, Dallas, Texas 75270 on December 28, 1983. I further certify that all parties required to be served have been served.

T. Alexander Beard

T. Alexander Beard
Counsel for Respondent